Johan Shipping Sdn Bhd (in liquidation) v Public Bank Bhd

HIGH COURT (KUCHING) — ORIGINATING SUMMONS NO KCH-24–2/1 OF 2012
RHODZARIAH BUJANG J
23 APRIL 2013

Companies and Corporations — Debenture — Voidability — Creation of debenture and charges — Whether disposition of property of company — Whether debenture and charges void because no leave of court obtained for creation of instruments — Whether debenture and charges amounted to improper alienation of property — Companies Act 1965 s 176(10C)

The plaintiff was a subsidiary company in liquidation wholly-owned by Swee Joo Bhd ('Swee Joo') and was in the shipping business, naturally owning several vessels. The plaintiff as well as Swee Joo and its other subsidiary, Asia Bulkers Sdn Bhd ('Asia Bulkers') failed to repay their debts to both lenders and financial institutions. This was announced by Bursa Malaysia and included in the announcement was that Swee Joo and its subsidiaries were in negotiations with their lenders on a restructuring scheme to resuscitate these ailing companies. The defendant was one of these lenders who initially derived their rights, from Hock Hua Bank Bhd to several debentures created by the plaintiff as securities for banking facilities in the form of overdraft/fixed loans. The defendant company continued to grant banking facilities to the plaintiff with debentures as one of the securities for the same. One and a half month later, on the joint application of the plaintiff, Swee Joo and Asia Bulkers, a restraining order pursuant to s 176(10C) of the Companies Act 1965 ('the Act') was obtained, restraining all creditors of the plaintiff for a period of 90 days from the date the order from appointment of receivers and managers and/or taking any action or proceeding whatsoever but not limited to winding-up, enforcement, execution, arbitration proceedings and admiralty in rem action for arrest of any of the applicants' vessels under such securities until the final outcome of the applicants application for and until final outcome of the court convened meetings in relation to the proposed scheme. The proposed scheme in the said order was stated in item 1 thereof as a scheme of arrangement and restructuring between the plaintiff, Swee Joo and Asia Bulkers and their creditors as defined in the proposed scheme pursuant to s 176 of the Act. The ninety days period stipulated in item 7 of the court order was extended twice by court orders, but it finally lapsed on 7 July, 2011 without any achievable result as no scheme of arrangement and restructuring was agreed by the three companies and their creditors. The defendant company did, however, on 30 November 2010 just two weeks after the restraining order was obtained, entered into an agreement with the plaintiff company to restructure and reschedule 13 of the fixed loans

and *al-Bai Bithman Ajil* facilities granted to it on condition, inter alia, that six of its vessels be the subject of new specific debentures. This agreement was entered pursuant to a letter of offer by the defendant which specifically stated that it was made upon the plaintiff's request to allow a two years deferment on repayment. About two months after that deferment period ended, the plaintiff filed the present originating summons for a declaration that the debentures created over the six vessels were null and void and/or alternatively unenforceable as well as an order to restrain the defendants from enforcing their rights under the said debentures. Three questions of law were raised in the originating summons namely, whether the creation of the debenture and the said charges in favour of the defendant constituted a disposition of the property of the company within the meaning of s 176(10C) of the Act; if so, whether the debenture and the said charges were void because no leave of court was obtained for the creation of these instruments during the subsistence of the restraining order granted under s 176(10C) of the Act; whether the debenture and the said charges amounted to an improper alienation of property of the plaintiff to the defendant to the exclusion and detriment of the other creditors of the plaintiff; and/or had the effect of granting the defendant unjust priority and/or an unfair advantage and/or undue preference over the other creditors of the plaintiff, either during the subsistence of the restraining order or presently when the company is in liquidation.

Held, dismissing the application with costs of RM5,000:

(1) Clause 4 of the debenture provided that the floating charge would be converted to a fixed charge on the vessels only upon default by the plaintiff and its conversion was only after a notice in writing was served on the plaintiff. The change in status of the charge on the vessels were, in other words, not a certainty by operation of the law (see para 16).

(2) Although the plaintiff's right to fully deal with the vessel were circumstanced by the clauses in the debenture, the ownership of the vessels clearly remained with plaintiff. Clause 9(a) provided that if the plaintiff intended to dispose or sell the vessels, the defendant must be informed in writing. In this regard, although cl 12.1(a) provided that the defendant could authorise the taking into possession and control of the vessels, that was only after the money secured by the debentures become immediately repayable (on default) or upon the plaintiff's own request. It was not the case that the defendant was given immediate possession and control of the vessels upon the creation of the debentures (see para 17).

(3) It was too late for the plaintiff to raise the issue of failure to obtain leave of the court for the creation of the debenture or that their creations gave undue preference or an unfair advantage to the plaintiff over the other creditors of theirs. These two matters or considerations should have been uppermost in their mind before they made the proposal to and/or accept

the letter of offer for the creation of the debentures from the defendant. Besides, no evidence of other creditors/lenders complaining of being victimised by the debentures was adduced at the hearing of the originating summons (see para 19).

[Bahasa Malaysia summary

Plaintif merupakan syarikat subsidiari yang dibubarkan dan dimiliki sepenuhnya oleh Swee Joo Bhd ('Swee Joo') dan menjalankan perniagaan perkapalan, dan dengan jelasnya memiliki beberapa kapal. Plaintif begitu juga Swee Joo dannya yang subsidiari lainnya, Asia Bulkers Sdn Bhd ('Asia Bulkers') gagal untuk membayar hutang mereka kepada peminjam dan institusi-institusi kewangan. Ini diumumkan oleh Bursa Malaysia dan dimasukkan di dalam pengumuman tersebut bahawa Swee Joo dan subsidiari-subsidiarinya sedang berbincang dengan peminjam-peminjam mereka mengenai skim penstrukturan semula untuk memulihkan semula syarikat-syarikatnya yang bermasalah. Defendan merupakan salah satu daripada peminjam-peminjam yang pada mulanya memperoleh hak mereka daripada Hock Hua Bank Bhd kepada beberapa debentur yang dibuat oleh plaintif sebagai cagaran-cagaran untuk kemudahan perbankan dalam bentuk overdraf/pinjaman-pinjaman tetap. Syarikat defendan terus memberikan kemudahan perbankan kepada plaintif dengan debentur sebagai satu daripada cagaran-cagaran tersebut untuk tujuan yang sama. Satu setengah bulan kemudian, atas permohonan bersama plaintif, Swee Joo dan Asia Bulkers, satu perintah menghalang menurut s 176(10C) Akta Syarikat 1965 ('Akta') diperolehi, menghalang semua pemiutang plaintif untuk tempoh selama 90 hari daripada tarikh perintah daripada perlantikan penerima-penerima dan pengurus-pengurus dan/atau mengambil sebarang tindakan atau prosiding apa jua tetapi tidak terhad kepada penggulungan, perlaksanaan, penguatkuasaan, prosiding-prosiding timbang tara dan tindakan *admiralti in rem* untuk menahan mana-mana kapal pemohon di bawah cagaran-cagaran tersebut sehingga keputusan akhir permohonan pemohon untuk dan sehingga keputusan akhir mesyuarat yang diadakan mahkamah berhubung skim yang dicadangkan. Skim yang dicadangkan di dalam perintah tersebut dinyatakan dalam butiran 1 sebagai satu skim penyusunan dan penstrukturan semula di antara plaintif, Swee Joo dan Asia Bulkers dan pemiutang-pemiutang mereka seperti yang ditakrifkan dalam skim yang dicadangkan menurut kepada s 176 Akta. Tempoh 90 hari yang dinyatakan dalam butiran 7 perintah mahkamah dilanjutkan dua kali melalui perintah mahkamah, tetapi akhirnya luput pada 7 Julai 2011 tanpa sebarang keputusan yang boleh dicapai memandangkan tiada skim penyusunan dan penstrukturan yang dipersetujui oleh ketiga-tiga syarikat dan pemiutang-pemiutang mereka. Syarikat defendan, bagaimanapun, pada 30 November 2010, hanya dua minggu selepas perintah menghalang diperoleh, memeterai satu perjanjian dengan syarikat plaintif untuk menstruktur semula dan menjadual semula 13 pinjaman tetap dan kemudahan-kemudahan *al-Bai Bithman Ajil* yang diberikan kepadanya dengan syarat, antara lainnya, bahawa

enam daripada kapal-kapalnya menjadi subjek khas debentur baru. Perjanjian ini dimeterai berpandukan surat tawaran oleh defendan yang secara spesifiknya menyatakan bahawa perjanjian tersebut dibuat atas permintaan plaintif untuk membenarkan dua tahun penangguhan bayaran balik. Sekitar dua bulan selepas tempoh penangguhan tamat, plaintif memfailkan saman pemula ini untuk satu deklarasi bahawa debentur-debentur yang dibuat terhadap keenam-enam kapal adalah tidak sah dan batal dan/atau secara alternatifnya tidak boleh dikuatkuasakan begitu juga dengan satu perintah untuk menghalang defendan-defendan daripada melaksanakan hak-hak mereka di bawah debentur-debentur tersebut. Tiga persoalan undang-undang dikemukakan dalam saman pemula iaitu, sama ada penciptaan debentur dan gadaian tersebut bagi pihak defendan merupakan pelupusan harta syarikat dalam erti kata s 176(10C) Akta; sekiranya demikian, sama ada debentur dan gadaian tersebut terbatal kerana tiada kebenaran mahkamah diperoleh untuk mewujudkan instrumen-instrumen ini semasa terdapatnya perintah menghalang yang diberikan di bawah s 176(10C) Akta; sama ada debentur dan gadaian tersebut merupakan pemindahan harta plaintif secara tidak wajar kepada defendan yang mengecualikan dan merugikan pemiutang-pemiutang plaintif yang lain; dan/atau mempunyai kesan memberikan defendan keutamaan tidak adil dan/atau kelebihan yang tidak adil dan/atau keutamaan tak wajar melebihi pemiutang-pemiutang plaintif yang lain, sama ada semasa terdapatnya perintah menghalang atau ketika ini, apabila syarikat dalam pembubaran.

Diputuskan, menolak permohonan dengan kos sebanyak RM5,000:

(1) Klausa 4 debentur memperuntukkan bahawa gadaian terapung akan bertukar kepada gadaian tetap ke atas kapal-kapal hanya apabila plaintif mungkir dan penukaran tersebut hanya selepas notis bertulis diserahkan kepada plaintif. Perubahan status gadaian ke atas kapal-kapal ialah, dalam erti kata lain, bukanlah satu kepastian melalui perlaksanaan undang-undang (lihat perenggan 16).

(2) Walaupun hak plaintif untuk menguruskan kapal-kapal digugat oleh klausa-klausa dalam debentur, milikan kapal-kapal jelas kekal dengan plaintif. Klausa 9(a) memperuntukkan bahawa sekiranya plaintif bertujuan melupuskan atau menjual kapal-kapal, defendan mesti dimaklumkan secara bertulis. Sehubungan dengan ini, walaupun klausa 12.1(a) memperuntukkan bahawa defendan boleh memberikan kebenaran mengambil milikan dan kawalan kapal-kapal, itu hanya selepas wang yang dijamin oleh debentur-debentur boleh dibayar semula serta-merta (disebabkan kemungkiran) atau atas permintaan plaintif. Ini bukanlah kes di mana defendan diberikan milikan segera dan kawalan kapal-kapal selepas kewujudan debentur-debentur (lihat perenggan 17).

(3) Adalah terlalu lambat untuk plaintif mengemukakan isu kegagalan

mendapatkan kebenaran mahkamah untuk kewujudan debentur atau bahawa kewujudannya memberikan keutamaan tak wajar atau kelebihan yang tidak adil kepada plaintif melebihi pemiutang-pemiutang mereka. Kedua-dua perkara ini atau pertimbangan-pertimbangan seharusnya difikirkan terlebih dahulu dalam minda mereka sebelum mereka membuat cadangan untuk dan/atau menerima surat tawaran untuk mewujudkan debentur-debentur daripada defendan. Di samping itu, tiada keterangan pemiutang-pemiutang/peminjam-peminjam lain yang mengadu ditindas oleh debentur-debentur dikemukakan pada pendengaran saman pemula (lihat perenggan 19).]

Notes

For a case on voidability, see 3(1) *Mallal's Digest* (4th Ed, 2011 Reissue) para 130.

Cases referred to

Lim Eng Chuan Sdn Bhd v United Malayan Banking Corp & Anor [2011] 1 MLJ 486, CA (refd)

Margart Pty Ltd, Re, Hamilton v Westpac Banking Corpn [1985] BCLC 314, SC (folld)

Markcon Sdn Bhd (in liquidation) v Resilient Construction Sdn Bhd (Labtec Sdn Bhd & Anor; opposing creditors) [1993] 3 MLJ 429, HC (folld)

Pioneer Haven Sdn Bhd v Ho Hup Construction Co Bhd & Anor and other appeals [2012] 3 MLJ 616, CA (refd)

QCD (M) Sdn Bhd v Wah Nam Plastic Industry Pte Ltd [1997] 2 SLR 544, HC (refd)

Site Preparations Ltd v Buchan Development Co Ltd [1983] SLT 317 (distd)

Legislation referred to

Companies Act 1965 ss 176, 176(10C), 223

Companies (Floating Charges and Receivers) (Scotland) Act 1972 [UK] s 1(2)

Companies (New South Wales) Code [AU] s 368

Shankar Ram (Francis Teron and Daniel Ling with him) (Thomas, Shankar Ram & Co Advocates) for the plaintiff.

HC Sim (Lim Lip Sze with him) (Reddi & Co Advocates) for the defendant.

Rhodzariah Bujang J:

[1] The plaintiff is a company in liquidation, which it voluntarily went into on 8 August 2011. It is a wholly owned subsidiary of Swee Joo Bhd ('Swee Joo') and its business was shipping. Thus the plaintiff were the owners of several vessels. The financial distress of the plaintiff as well as Swee Joo and its other subsidiary, Asia Bulkers Sdn Bhd ('Asia Bulkers') arising from their failure to

repay their debts to both lenders and financial institutions was announced by Bursa Malaysia on 30 August 2010. Included in the announcement was that Swee Joo and its subsidiaries were in negotiations with their lenders on a restructuring scheme to resuscitate these ailing companies. The defendant was one of these lenders who initially derived their rights, from Hock Hua Bank Bhd vide a vesting order dated 12 March 2001 to several debentures created by the plaintiff in 1996 to 2000 as securities for banking facilities in the form of overdraft/fixed loans. The defendant company continued thereafter to grant banking facilities to the plaintiff with debentures as one of the securities for the same.

THE RESTRAINING ORDER

[2] One and a half month after that announcement, on the joint application of the plaintiff, Swee Joo and Asia Bulkers, a restraining order pursuant to s 176(10C) of the Companies Act 1965 ('the Act') was obtained and in para 7 thereof all creditors of the plaintiff were 'restrained … for a period of ninety days from the date the order from appointment of receivers and managers and/or taking any action or proceeding whatsoever but not limited to winding-up, enforcement, execution, arbitration proceedings and admiralty in rem action for arrest of any of the applicants' vessels under such securities until the final outcome of the applicants application for and until final outcome of the Court Convened Meetings in relation to the Proposed Scheme herein.'

[3] The proposed scheme in the said order is stated in item 1 thereof as a scheme of arrangement and restructuring between the plaintiff, Swee Joo and Asia Bulkers and their creditors as defined in the proposed scheme pursuant to s 176 of the Act.

[4] The 90 days period stipulated in item 7 of the court order was extended twice by court orders, but it finally lapsed on 7 July 2011 without any achievable result as no scheme of arrangement and restructuring was agreed by the three companies and their creditors.

[5] The defendant company did, however, on 30 November 2010 just two weeks after the restraining order was obtained, entered into an agreement with the plaintiff company to restructure and reschedule 13 of the fixed loans and *Al-Bai Bithman Ajil* facilities granted to it on condition, inter alia, that six of its vessels be the subject of new specific debentures. This agreement was entered pursuant to a letter of offer by the defendant dated 22 October 2010 which specifically states that it was made upon the plaintiff's request to allow a two years deferment on repayment (from November 2010–October 2012) of the banking facilities mentioned earlier.

[6] About two months after that deferment period ended, the plaintiff has filed this originating summons for a declaration that the debentures created over the six vessels are null and void and/or alternatively unenforceable as well as an order to restrain the defendants from enforcing their rights under the said debentures. There is even a prayer on damages which, I can state at the outset and based on the facts of this case, to be is clearly unsustainable. The grounds for filing this action are encapsulated by the three questions of law framed in the originating summons as follows:

(1) whether the creation of the Debenture and the said Charges (over 6 vessels of the plaintiff) in favour of the defendant constitutes a disposition of the property of the company within the meaning of section 176 (10C), Companies Act 1965;

(2) if so, whether the Debenture and the said charges are void because no leave of court was obtained for the creation of these instruments during the subsistence of the restraining order granted under section 176 (10C), Companies Act 1965 on 13th October, 2010.

(3) whether the debenture and the said charges amounts to an improper alienation of property of the plaintiff to the defendant to the exclusion and detriment of the other creditors of the plaintiff; and/or has the effect of granting the defendant unjust priority and/or an unfair advantage and/or undue preference over the other creditors of the plaintiff, either during the subsistence of the restraining order dated 13th October 2010 (pending the formulation of the proposed scheme of arrangement) or presently when the company is in liquidation.

[7] All the agreements and documents including court orders mentioned earlier in this judgment are exhibited to the affidavit in support of the originating summons and the facts as narrated are not at all disputed. The dispute actually turns on the three questions of law as stated above.

A DISPOSITION

[8] Section 176(10C) provides as follows:

> Any disposition of the property of the company, including things in action and any acquisition of property by the company, other than those made in the ordinary course of business, made after the grant of the restraining order by the court shall, unless the court otherwise orders, be void.

[9] It is a disposition said Mr Shankar Ram for the plaintiff because the Supreme Court of New South Wales in *Re Margart Pty Ltd, Hamilton v Westpac Banking Corporation and another* [1985] BCLC 314 interpreted the New South Wales's equivalent provision, s 368 of the Companies (New South Wales) Code to mean, in reference to property, a change in the beneficial

ownership of an asset by transfer or other type of dealing. In addition, a Singapore case, *QCD (M) Sdn Bhd v Wah Nam Plastic Industry Pte Ltd* [1997] 2 SLR 544 was also cited by him in support though it concerns s 223 of the Act, which contains a similar prohibition on disposition of a company's property but after it has been wound up by the court. Though a Singapore court's decision, the court was required to consider the provisions of the Act on winding up since the plaintiffs in that case was a Malaysian company which had been wound up by our Malaysian court but sued a Singapore company (the defendant) without the consent of the official receiver who was appointed as the provisional liquidator.

[10] Choo Han Teck JC in this Singapore case also referred to *Re Margart*'s case for the meaning of 'disposition' and he agreed with Helsham CJ in the said case that disposition does not include the process by which a person with a beneficial interest in the property obtains that property or the proceeds of its realisation, from the company at the time when that event occurs. In other words, said His Lordship the word 'disposition' when used in reference to property, normally has the meaning *of connoting a change in the beneficial ownership of an asset by transfer or other type of dealing*. He then went on to conclude after expressing his agreement with Helshem CJ, as follows:

> Indeed, on the contrary, the liquidator requires the consent of the debenture holders if he intend to dispose of charged property. It must be correct, therefore, to conclude that the references to a disposition of property envisaged by s 223 of the (Malaysian Companies Act) does not include property the beneficial interest of which rests in a mortgagee or debenture holder.

[11] By reason of this statement, the defendant's counsel, Mr HC Sim submitted that the two case authorities actually supported their stand that the creation of the debentures were not a 'disposition' within the meaning of that s 176(10C), of the Act. In further support of their argument, he referred to the terms of the agreement cll 6.2 and 9 thereof which show that the plaintiff is still the owner of the vessels and they provide as follows:

> 6.2 The Borrower shall do all acts and take all steps necessary or expedient to safeguard and preserve the Vessel and each part thereof or the ownership thereto.
>
> …
>
> 9. Undertaking
>
> The borrower undertakes in favour of the lender:
>
> (a) to inform the lender in writing forthwith if it proposes or intends to dispose or sell the Vessel at any time during the subsistence of this debenture;
>
> (b) to keep in good state of repair and in proper working order and to renew

and replace, when necessary, the Vessel, machinery and equipment belonging to or used by the borrower;

[12] The Court of Appeal's case of *Lim Eng Chuan Sdn Bhd v United Malayan Banking Corp & Anor* [2011] 1 MLJ 486 which also quoted *Re Margart*'s case was also cited by Mr HC Sim as well as another of its decision in *Pioneer Haven Sdn Bhd v Ho Hup Construction Co Bhd & Anor and other appeals* [2012] 3 MLJ 616 where *Re Margart*'s case was similarly quoted.

[13] What I noted from *Re Margart*'s case, the Singapore's case of *QCB and Lim Eng Chuan*'s case is this common feature — the creation of the rights vide the relevant instruments were done before the winding up of the owner of the assets. In *Re Margart*'s case, it was for the recovery of money paid into the plaintiff's account with the defendant bank after the winding up order that was realised after the presentation of the application to wind up the plaintiff company. The argument of the liquidator that the disposition of the assets of the company was void under s 368 and not recoverable by the defendant bank was dismissed by the court with the reasoning that 'disposition' under the said section does not include the process by which a person with beneficial *interest* in property obtained that property or the proceeds of its realisation, as a disposition normally required a change of *beneficial ownership*.

[14] In spite of that common feature which is not present in this case, what is important to note is the difference between 'beneficial interest' and 'beneficial ownership'. What the defendants acquired from the creation of the debentures and the charges was a beneficial interest in the vessels but not its ownership. Following the rationale in *Re Margart*'s case, therefore, the creation of the debenture, ipso facto, is not a disposition of the plaintiff's vessels.

[15] The case of 317 *Site Preparations Ltd v Buchan Development Co Ltd* [1983] SLT 317 cited by Mr Shankar Ram in support of his argument is distinguishable because of the law which applies in that case which is absent in this one before me. That law is s 1(2) of the Companies (Floating Charges and Receivers) (Scotland) Act 1972 which provides that a floating charge created before the commencement of the winding up of the chargor attaches to the property and has the effect as if the charge were a fixed security over the property to which it has attached. That being so, held Lord Ross, the floating charge created after the commencement of the winding up, constituited a disposition of the company's property and has the effect as if it was a fixed security.

[16] In this case, cl 4 of the debenture provides that the floating charge would be converted to a fixed charge on the vessels *only* upon default by the plaintiff under cl 10 and its conversion is only after a notice in writing is served

on the plaintiff. The change in status of the charge on the vessels are, in other words, not a certainty by operation of the law as in the cited case.

[17] Although the plaintiff's right to fully deal with the vessel are circumstanced by the clauses in the debenture such as in cl 5(a) and the clauses on the undertakings by them in cl 9(a)–(h) of the debenture at pp 5–7 thereof (exh JR10 to the affidavit in support of the plaintiff) the ownership of the vessels clearly remained with plaintiff as can be seen in cl 9(a) where it provides that if the plaintiff intends to dispose or sell the vessels, the defendant must be informed in writing. In this regard, although cl 12.1(a) provides that the defendant can authorised the taking into possession and control of the vessels, that is only after the money secured by the debentures become immediately repayable (on default) or upon the plaintiff's own request. It is not the case that the defendant was given immediate possession and control of the vessels upon the creation of the debentures.

[18] My other consideration on this issue is that the fact that these debentures and charges were created as an arrangement proposed by the plaintiff themselves 'to allow two years deferment of the principal instalment repayment' of the banking facilities stated earlier (see the letter of offer exhibited as part of JR 9 to the affidavit in support of the originating summons), that request was made by the plaintiff in full appreciation of the restraining order which they themselves, and not some other creditors applied for. In the light of these facts, it would be simply unconscionable to allow the plaintiff to raise illegality and contravention of the law to avoid the legal consequences attached to the creation of the debentures. Unlike the cases which were cited earlier which as I have mentioned, concerned acts done before the winding up of the company, these debentures were created at the behest of the plaintiff whilst the restraining order was in place. It takes, as the saying goes, two to tango and I do not think that as an active participant and a mover for the creation of the debentures, the plaintiff ought to be allowed to seek refuge from the law which they themselves have been instrumental in its alleged flouting.

[19] It is, therefore, too late in the day for them to raise the issue of failure to obtain leave of the court for the creation of the debenture or that their creations gave undue preference or an unfair advantage to the plaintiff over the other creditors of theirs as framed in the second and third questions of the originating summons, respectively. These two matters or considerations should have been uppermost in their mind before they made the proposal to and/or accept the letter of offer for the creation of the debentures from the defendant. Besides, no evidence of other creditors/lenders complaining of being victimised by the debentures was adduced at the hearing of the originating summons and the consideration I just made above on the plaintiff's own conduct militating

against the grant of the prayers in this originating summons also applies to this second and third questions of law framed by them.

[20] For all the above reasons, I dismiss the application and I do so with cost of RM5,000 but not to be borne by the liquidator personally as urged upon me by Mr HC Sim. Though I agree with James Foong J (as His Lordship then was) in *Markcon Sdn Bhd (in liquidation) v Resilient Construction Sdn Bhd (Labtec Sdn Bhd & Anor; opposing creditors)* [1993] 3 MLJ 429 that the court has a discretion to award costs personally against the liquidator as a sanction for instituiting unnecessary proceedings or incurring unnecessary litigation expenses, I do not have the evidence that he had instituited this action, in the name of the plaintiff, out of bad faith or misguided sense of propriety of the course of action he has taken.

Application dismissed with costs of RM5,000.

Reported by Afiq Mohamad Noor